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NEXTDOOR.COM, INC.

14  
15 UNITED STATES DISTRICT COURT

16 NORTHERN DISTRICT OF CALIFORNIA

17 SAN FRANCISCO DIVISION

18 NEXTDOOR.COM, INC., a Delaware  
19 corporation,

20 Plaintiff,

21 v.

22 RAJ ABHYANKER, an individual,

23 Defendant.

Case No.: 3:12-cv-05667-EMC-NMC

**NEXTDOOR.COM, INC.'S  
TRIAL STATEMENT**

**[PER DOCKET 398]**

Final Pretrial  
Conference: November 25, 2014  
Time: 2:30 p.m.  
Courtroom: 5, 17th Floor  
Judge: Hon. Edward M. Chen  
Trial Date: December 1, 2014

**I. NEXTDOOR.COM'S THEORY OF THE CASE**

There is no dispute that Defendant Raj Abhyanker set up and began operating a site using the NEXTDOOR mark at www.nextdoor.cm (the “.cm Domain”) shortly after Nextdoor.com’s public launch. *See, e.g.*, Dkt. 332-9, Ex. H. This Court has also already found that (i) the NEXTDOOR mark is distinctive, and (ii) Abhyanker’s use of the NEXTDOOR mark on that site was likely to confuse. The only element at issue is whether Abhyanker had a “bad faith intent to profit” in connection with his registration and use of the .cm Domain.

The evidence will overwhelmingly show he did. Abhyanker used the .cm Domain not only to divert traffic to a “typo-squatting” site that mimicked Nextdoor.com’s site, but also to support his knowingly false assertion that he had priority of use in the NEXTDOOR mark. Abhyanker’s motive was clear: to gain leverage in his dispute with Nextdoor.com, to his financial advantage. Indeed, any doubt that Abhyanker had no legitimate reason to operate the .cm Domain vanished when he admitted, at deposition, that he did so because he was “upset” about Nextdoor.com’s successful launch in a field where he intended to compete.

**II. PERTINENT FACTUAL HISTORY**

In October 2006, Abhyanker had an idea to create a social network. But after he failed in his effort to acquire the domain name www.nextdoor.com on October 24, 2006, he opted for the name “Fatdoor,” incorporating Fatdoor, Inc. the next day. Undisputed Fact No. 21. A few months later, he assigned all his rights, including any in his Nextdoor/Fatdoor concept and related patents and intellectual property, to Fatdoor, Inc. Ex. 180. Abhyanker represented to investors in Fatdoor that he had conveyed all his related IP rights, and described the Fatdoor concept as “formerly Nextdoor.” Ex. 225. But other than that, he never used the Nextdoor name again—that is, until Nextdoor.com launched.

Fatdoor was not successful. In mid-2007, Fatdoor’s Board fired Abhyanker. In April 2008, Fatdoor changed its name to Center’d and changed business plans. Eventually, in 2011, Google acquired most of Center’d’s assets. The residue went into a liquidating trust managed by Sherwood Partners. None of those entities ever used, or gave Abhyanker, the name Nextdoor.

After his stint at Fatdoor, Abhyanker pursued a number of different ideas, including

1 dabbling in other unsuccessful social networks, such as eDirectree.com. Other than documents  
 2 *created after the launch of Nextdoor.com* there is no evidence of any of Abhyanker's businesses,  
 3 including eDirectree, eatbid, Trademarkia, or Legalforce, using the term "nextdoor."

4 Nextdoor.com launched its social networking site on October 26, 2011. Undisputed Fact  
 5 No. 4. The next day, Abhyanker sent an unsolicited email to its CEO congratulating him and  
 6 stating he had pursued a similar concept under the name Fatdoor. Ex. 11. He said nothing about  
 7 owning the "nextdoor" name. *Id.* The CEO, not knowing Abhyanker, did not respond.

8 Two weeks later, Abhyanker sued Nextdoor.com for misappropriation in state court. *See*  
 9 Undisputed Fact No. 40. Then, on December 28, 2011, Abhyanker registered the .cm Domain.  
 10 *See* Undisputed Fact Nos. 10-12. That same day, he also applied for registration of the  
 11 NEXTDOOR mark in his own name. In February 2012, as an amendment to allege his use and  
 12 priority, he cited to the USPTO his use on the .cm Domain and submitted an exemplar of that use,  
 13 which included the NEXTDOOR mark. *See* Undisputed Fact Nos. 7-9, 14-15.

14 Nextdoor.com and the other defendants demurred in the State Court Action, all  
 15 challenging Abhyanker's standing to assert claims that his pleadings showed were owned, if by  
 16 anyone, by Fatdoor, Inc. Abhyanker voluntarily dismissed that case in March 2012.

17 Meanwhile, in January 2012, he commenced opposition proceedings in the TTAB  
 18 blocking issuance of Nextdoor.com's pending trademark registration, asserting his use of the .cm  
 19 Domain as a basis for his alleged priority in the NEXTDOOR mark. *See* Undisputed Fact Nos. 7-  
 20 9, 14-15. On February 9, 2012, he repurchased the eDirectree.com domain (which had been  
 21 offline since at least February 2009) and sometime thereafter added the term "Nextdoor™  
 22 Neighbors" to the website. Ex. 101. He then manufactured a screenshot to support his claim that  
 23 he had been using the NEXTDOOR mark on eDirectree.com since before Nextdoor.com's  
 24 launch, and cited it to the TTAB (as well as later in this case). *Id.*

25 On March 22, 2012, Nextdoor.com sent Abhyanker a letter regarding his infringement,  
 26 demanding that he cease all use of the NEXTDOOR mark, including the .cm Domain. *See*  
 27 Undisputed Fact No. 47. He refused. *See* Undisputed Fact No. 48. On November 5, 2012,  
 28 Nextdoor.com filed this suit, seeking to put an end to Abhyanker's harassment and clear its title

1 to the NEXTDOOR mark. *See* Undisputed Fact No. 49. Within days, Abhyanker removed all  
2 content on the .cm Domain.

3 Then, to manufacture standing, purportedly acting on behalf of Center'd, he executed a  
4 fake assignment of its purported residual assets (there were none) to himself for \$1. Ex. 186.  
5 Although he tendered that assignment to the Court as genuine, in fact he knew perfectly well that  
6 he had no such authority, as reflected in contemporaneous emails. Exs. 188, Ex. G; 189; 190.

7 Abhyanker then proceeded to defend this case aggressively and to assert numerous  
8 counterclaims premised, *inter alia*, on his purported senior use of the NEXTDOOR mark. *See*,  
9 *e.g.*, Dkt. 132, Ex. A. Required by the Court to provide documentary proof of prior use, he told  
10 the Court he had only the eDirectree screenshot. Ex. 101. But after his fabrication of the  
11 eDirectree screenshot came to light, Abhyanker dismissed with prejudice his claim for priority,  
12 and stipulated to an injunction against any further use of the NEXTDOOR mark. Dkts. 192, 193.  
13 During his deposition (by which point many other fabrications had been uncovered), Abhyanker  
14 admitted he had registered the .cm Domain because he was “upset” and “saddened” that he was  
15 not a part of Nextdoor.com’s success. June 11, 2014 Depo. Tx. 530:3 - 531:4; 532:15-20. He  
16 also testified that at the time he operated the .cm Domain, he intended to compete with  
17 Nextdoor.com. August 4, 2014 Depo. Tx. 773:12-776:05.

### 18 **III. NEXTDOOR.COM WILL EASILY PREVAIL ON ITS CYBERPIRACY CLAIM**

19 As this Court noted [Dkt. 397], the only element of Nextdoor.com’s ACPA claim that  
20 remains at issue is whether Abhyanker acted in bad faith. The evidence easily supports the  
21 conclusion he did. The bad faith element of the ACPA reaches a wide variety of activities,  
22 including use of a domain to obtain leverage in a business dispute, to divert traffic by confusing  
23 potential customers, or otherwise to gain some competitive advantage over a mark holder—all of  
24 which Abhyanker engaged in here.<sup>1</sup> Further, the inquiry does not simply focus on a defendant’s

25 \_\_\_\_\_  
26 <sup>1</sup> *See, e.g., GoPets Ltd. v. Hise*, 657 F.3d 1024, 1032 (9th Cir. 2011) (bad faith found where  
27 defendant intended to divert traffic by confusing consumers); *Super-Krete Int’l, Inc. v. Sadleir*,  
28 712 F. Supp. 2d 1023, 1033 (C.D. Cal. 2010) (use of a “confusingly similar” domain to route  
potential customers to defendant’s website supported a bad faith claim); *Rearden LLC v. Rearden  
Commerce, Inc.*, 683 F.3d 1190, 1220-21 (9th Cir. 2012) (“Rearden Commerce acted in bad faith  
by seeking to gain leverage in an ongoing trademark dispute.”).

1 state of mind when he registered the domain, rather “evidence of bad faith may arise well after  
2 registration....” *See, e.g., Lahoti v. VeriCheck, Inc.*, 586 F.3d 1190, 1202 (9th Cir. 2009).

3 The ACPA lays out nine non-exclusive factors that may be considered in making a  
4 determination of bad faith, but it is the “unique circumstances” of each case that are most  
5 important.<sup>2</sup> This includes inferring bad faith from continued use of an offending domain after  
6 notice of the infringement. Courts also consider the egregiousness of the defendant’s  
7 cybersquatting and his behavior evidencing an attitude of contempt for the judicial process.  
8 *Verizon California, Inc. v. Onlinenic, Inc.*, No. C 08–2832, 2009 WL 2706393, at \*3-6 (N.D. Cal.  
9 2009). Under this analysis, the conclusion that Abhyanker acted in bad faith is inescapable.

10 **A. Seven of the Nine Statutory Factors Favor a Finding of Bad Faith**

11 **Factor I:** (trademark or other intellectual property rights of the person, if any, *in the*  
12 *domain name*). Abhyanker had no rights in the NEXTDOOR mark or .cm Domain. The Court  
13 has already found that he had neither trade secret nor trademark rights in the term “nextdoor.”  
14 Dkt. 100, 193. Abhyanker intends to claim he had some rights in the name stemming from the  
15 inclusion of the “nextdoor.com” name in patent applications he filed in 2006-2007. But his patent  
16 assertions were never disclosed in initial disclosures, were therefore not subject to discovery, and  
17 cannot fairly be added to trial now. Nor did he ever identify his bizarre theory of patents being a  
18 source of trademark rights during fact discovery. *See* Response to Interrogatory Nos. 1, 5 (not  
19 mentioning patents in response to requests to describe public uses of “nextdoor” and to “state all  
20 facts supporting your claim to ownership of the Nextdoor mark”). In all events, any such claims  
21 are unavailing for multiple reasons. Most obviously, names are not patentable subject matter.  
22 And even his own expert acknowledged that Abhyanker held no ownership interest in the asserted  
23 patent rights during his period of use of the .cm Domain. Deposition of Sheldon p. 62:20 – 66:14.

24  
25 <sup>2</sup> The ACPA does not require that all the factors be analyzed. For example, there is no  
26 requirement that a defendant attempt to sell the domain name to find the registrant acted in bad  
27 faith. *See DSPT Int’l, Inc. v. Nahum*, 624 F.3d 1213, 1218-19 (9<sup>th</sup> Cir. 2010). Similarly, an  
28 infringer does not need to register multiple similar domains to commit cyberpiracy – just one  
infringing domain name can be enough. *See e.g., id.* (affirming finding of cyberpiracy for a  
single domain); *Internet Specialties West, Inc. v. Milon-DiGiorgio Enterprises, Inc.*, 559 F.3d 985  
(9th Cir. 2009) (same).

Further, even the rights that Abhyanker claims now are hotly disputed, as they are based on a 2014 assignment he executed to himself on behalf of GeoTag (an assignee of Fatdoor), without GeoTag's permission. Ex. 239. These patent issues are briefed more extensively in Nextdoor.com's MIL No. 3 (Dkt. No. 380) and its Objections to Abhyanker's Proposed Witness List at 2-3. Dkt. No. 395-1. There is no conceivable way Abhyanker could claim any IP rights in the term "nextdoor," much less at the relevant time.

**Factor II:** (legal or other name commonly used to identify that person). Abhyanker was never known as "nextdoor"; that is not and was not his legal name; and though he may have used the term internally and hoped to purchase the www.nextdoor.com domain in 2006, he never did.

**Factor III:** (prior use, if any, of the domain name in connection with the *bona fide* offering of any goods or services). Abhyanker has never offered any goods or services in connection with the NEXTDOOR mark; to the contrary, he opted to use FATDOOR.

**Factor IV:** (bona fide noncommercial or fair use of the mark under the domain name). Abhyanker sought to compete with Nextdoor.com, usurp its trademark, and confuse prospective customers. He copied the "nextdoor.com" name and content into the site using the .cm Domain, pretending to be Nextdoor.com. *See, e.g.,* Dkt. 332-9, Ex. H; Undisputed Fact No. 45. And he attempted to leverage the .cm Domain to support his false claims of priority before the TTAB. *See* Undisputed Fact Nos. 7-9, 14-15. There was nothing non-commercial or "fair" about this.

**Factor V:** (intent to divert consumers from Plaintiff's website). Abhyanker chose the .cm suffix, the registry for Cameroon, to divert traffic of users who mistyped www.nextdoor.com. *See* Undisputed Fact Nos. 11-12. He never registered any domain incorporating the "nextdoor" name other than this "unlawful typosquat." *See Verizon California, Inc. v. Navigation Catalyst Sys., Inc.*, 568 F. Supp. 2d 1088, 1097 (C.D. Cal. 2008) (this factor cut "strongly against" defendants who typosquat).

**Factors XIII and IX:** (whether the party registered a domain name known to be confusingly similar to the mark of another and whether the mark is distinctive). The Court has already determined the NEXTDOOR mark is distinctive, and that Abhyanker used the identical mark. Dkt. 361. Even more, Abhyanker admitted he registered and used the .cm Domain name NEXTDOOR.COM, INC.'S TRIAL STATEMENT

1 with knowledge of Nextdoor.com's NEXTDOOR mark. August 4, 2014 Depo. Tx. 775:19-25.

2 Both factors strongly favor Nextdoor.com.

3 **B. The Unique Circumstances Here, Including Abhyanker's Intent, Willfulness**  
 4 **and Fabrications, Confirm He Acted In Bad Faith**

5 Finally, the unique circumstances of this case also strongly support a finding of bad faith.  
 6 Abhyanker *admitted* he registered and operated the .cm Domain out of anger. He defiantly  
 7 continued operating it after Nextdoor.com's warning that his conduct was unlawful. *See Louis*  
 8 *Vuitton Malletier and Oakley, Inc. v. Veit*, 211 F. Supp. 2d 567, 583 (E.D. Pa. 2002) (willfulness  
 9 inferred from continuing infringing behavior after notice of claim). He did not offer any goods or  
 10 services in connection with his site; he merely pretended to be Nextdoor.com. Further, he  
 11 fabricated the only "evidence" of his alleged prior use of the NEXTDOOR mark (on the  
 12 eDirectree site), and spoliated the site's source code, which could have definitively proven he  
 13 never actually used the mark on that site prior to Nextdoor.com's launch. Abhyanker used this  
 14 fabricated evidence to gain leverage in multiple proceedings involving Nextdoor.com. And, as  
 15 will be substantiated by forensic expert David McCain, he fabricated additional evidence to  
 16 simulate his supposed desire and intent to use the mark between 2006 and 2011, and his standing  
 17 to do so, negating any claim of a reasonable "good faith belief" that he had rights to a mark he  
 18 had never, prior to Nextdoor.com's launch, publicly used.

19 **C. The Evidence Precludes Any Defense Under The ACPA's Safe Harbor**

20 The ACPA "safe harbor" defense is reserved for defendants who can prove they both  
 21 subjectively *and* reasonably believed they had the right to use the domain. 15 U.S.C  
 22 §1125(d)(1)(B)(ii); *see also GoPets Ltd.*, 657 F.3d at 1033 (safe harbor inapplicable where  
 23 defendants had no reason to believe they had the right to register identical or confusingly similar  
 24 domain names). The safe harbor defense applies "very sparingly and only in the most unusual  
 25 cases." *Lahoti*, 586 F.3d at 1203 *citing Audi AG v. D'Amato*, 469 F.3d 534, 549 (6th Cir. 2006).

26 Critically, a "defendant who acts even partially in bad faith...is not, as a matter of law,  
 27 entitled to benefit from the ACPA's safe harbor provision." *Lahoti*, 586 F.3d at 1203 ("We agree  
 28 with the Fourth Circuit, which, in affirming a summary judgment determination of bad faith, has



1 held that ‘[a] defendant who acts even partially in bad faith in registering a domain name is not,  
2 as a matter of law, entitled to benefit from the [the ACPA’s] safe harbor provision.’”) (quoting  
3 *Virtual Works, Inc. v. Volkswagen of Am., Inc.*, 238 F.3d 264, 270 (4th Cir. 2001)); *City of*  
4 *Carlsbad v. Shah*, 850 F. Supp. 2d 1087, 1107 (S.D. Cal. 2012) (domain registrant’s actions  
5 during the course of the litigation contradicted any claim of good faith and precluded protection  
6 under the ACPA’s safe harbor provision). Thus, Abhyanker cannot avail himself of this defense.

7 Aside from the fact that Abhyanker acted in bad faith (and not just “partially”), his claim  
8 that he “honestly” believed he had rights in the mark is as disingenuous as his claim that his use  
9 of the NEXTDOOR mark, on the .cm Domain, was not likely to confuse. The truth is,  
10 Abhyanker made no use of “nextdoor” at all, from 2006 through 2011. He knew he had no  
11 legitimate claim to senior rights in the mark once Nextdoor.com had launched, so he concocted an  
12 elaborate story, manufactured evidence of use that never occurred, and now appears to be relying  
13 on a theory that he had some “intent to use” the mark during that period. But a mere intention to  
14 use a mark, even if Abhyanker actually (and contrary to the evidence) actually held it, would not  
15 give rise to trademark rights. Abhyanker—who runs a trademark prosecution firm—knows that.

16 Indeed the evidence could never support Abhyanker’s claim that he acted in good faith.  
17 Such an assertion is gutted by evidence showing he manufactured documents to support his  
18 claims of priority, and hence, knew those claims to be false. This includes his fabrication of use  
19 on his eDirectree site, his fabrication of content allegedly contained in diligence materials given  
20 to potential investors in 2007, and three fabricated assignment agreements to support his claim of  
21 standing. *See, e.g.*, Exs. 101; 183; 186; 188, Ex. G; 196; 239; 251; and 456. This renders  
22 incredible any assertion by Abhyanker that he believed, in good faith, that he had senior rights in  
23 the NEXTDOOR mark at the time he was operating his imitation website.

24 Dated: November 10, 2014

FENWICK & WEST LLP

26 By: /s/ Laurence F. Pulgram  
27 Laurence F. Pulgram

28 Attorneys for Plaintiff  
NEXTDOOR.COM, INC.